

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

HELLMANN WORLDWIDE LOGISTICS,  
INC.,

Plaintiff,

vs.

BRUCE HARRIS, PHILIP MCINERNEY,  
HALLIE ANGEL, AND PACNOR  
TRANSPORTATION, LLC,

Defendants.

Case No. C09 – 0738 TSZ

DEFENDANT BRUCE HARRIS’  
SECOND MOTION TO DISMISS  
PLAINTIFF’S RICO AND STATE LAW  
CLAIMS

NOTE ON MOTION  
CALENDAR: Friday, October 30, 2009

**I. INTRODUCTION**

On September 10, 2009, the Court dismissed Hellmann Worldwide Logistics, Inc.’s (“Hellmann”) RICO and state law fraud claims because of Hellmann’s “failure to plead these claims with the requisite particularity.”<sup>1</sup> As the Court noted:

In addition to stating the time, place, and content of an alleged misrepresentation, the plaintiff must “set forth what is false or misleading about a statement and why it is false.” *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-48 (9<sup>th</sup> Cir. 1994). Plaintiff’s Complaint does not allege the RICO predicate acts of mail and wire fraud or the state law fraud claim with sufficient particularity to meet the requirements of Rule 9(b).<sup>2</sup>

<sup>1</sup> Minute Order dated September 10, 2009 at p. 1 (Docket No. 19) (“Order”).

<sup>2</sup> *Id.* at p. 2.

1 The Court granted leave to amend the Complaint, and Hellmann filed an Amended Complaint  
 2 on September 25, 2009. But Hellmann's Amended Complaint is still deficient, adding nothing more  
 3 than allegations identifying the alleged fraudulent transactions, which is insufficient to satisfy the  
 4 specificity requirements of Rule 9(b). Hellmann's RICO and state law fraud claims should be  
 5 dismissed. The Court should also decline to exercise supplemental jurisdiction over Hellmann's  
 6 remaining state law claims pursuant to 28 U.S.C.A. § 1367 (c).

## 7 **II. FACTS**

8 The Court is familiar with the facts of this case from defendant Bruce Harris' ("Harris")  
 9 previous Motion to Dismiss and related pleadings. The factual recitations in those pleadings are  
 10 hereby incorporated by reference. The following brief summary is provided merely to frame the  
 11 issues for the Court's convenience.

12 Hellmann's claims are based on an alleged scheme hatched by defendants Harris, Philip  
 13 McInerny ("McInerny"), and Hallie Engel ("Engel") to spirit funds away from Hellmann.  
 14 Specifically, Hellmann alleges that Harris, McInerny, and Engel formed Pacnor Transportation, LLC  
 15 ("Pacnor") to submit invoices to Hellmann charging Hellmann for services that Pacnor never  
 16 performed.

17 In its original Complaint, Hellmann alleged that the defendants "sent, via U.S. Mail, invoices  
 18 to Hellmann in the name of Pacnor, charging Hellmann for its services that Pacnor never performed,  
 19 for an inflated amount even if these services were performed, and with the intent to defraud Hellmann  
 20 of the amounts charged."<sup>3</sup> And according to Hellmann, Harris approved Pacnor as a vendor knowing  
 21 that McInerny would approve the allegedly fraudulent invoices, that McInerny in fact approved the  
 22 invoices and mailed Pacnor checks for payment of those invoices, and that Engel received those  
 23 checks as payment for the allegedly fraudulent invoices she sent.<sup>4</sup> Hellmann further alleged that  
 24 Harris on more than one occasion "sent emails to Hellmann's offices in Costa Rica in furtherance of

25 <sup>3</sup> Complaint at 2, ¶¶9, 10.

<sup>4</sup> *Id.* at ¶¶11-13.

1 the Enterprise's scheme to defraud Hellmann as described above, and with the intent to defraud  
2 Hellmann of the amounts charged."<sup>5</sup>

3 With respect to its state law fraud claims, Hellmann alleged simply that Harris "made several  
4 false representations of material fact to Hellmann (that services were performed by Pacnor and that  
5 Pacnor was owed the amount it charged for its services), knowing that those representations were  
6 false at the time made, and with the intent to induce Hellmann to remit monies to Pacnor in reliance  
7 on those false representations, as described above."<sup>6</sup>

8 Hellmann amended its RICO claims primarily by adding new paragraphs 9.1-9.20, 10.1-  
9 10.10, and 11.1-11.12 to "Count I: RICO 18. U.S.C. §1964(c)." Hellmann amended its state law  
10 fraud claim in new paragraphs 27-30. The additional allegations and their insufficiency to cure the  
11 defects in Hellmann's original Complaint are discussed below.

### 12 III. ARGUMENT

#### 13 A. **The Amended Complaint Does Not Save Hellmann's RICO Claims Because it Still Fails 14 to Comply with Rule 9(b)'s Requirement to Set Forth With Particularity Those 15 Circumstances Which *Constitute* Fraud.**

16 As the Court stated in its September 10 Order:

17 In claims of fraud the plaintiff must "state with particularity the circumstances constituting  
18 fraud or mistake." Fed R. Civ. P. 9(b). This particularity requirement applies to RICO claims  
19 predicated on fraud. *See Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9<sup>th</sup>  
20 Cir. 1989).<sup>7</sup>

21 In *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541 (9<sup>th</sup> Cir. 1994), the Ninth Circuit  
22 held that this requires that:

23 [A] plaintiff must set forth more than the neutral facts necessary to identify the  
24 transaction. The plaintiff must set forth what is false or misleading about a statement,  
25 and why it is false. In other words, the plaintiff must set forth an explanation as to why  
the statement or omission complained of was false or misleading.

*Id.* at 1547 (emphasis added).

<sup>5</sup> *Id.* at ¶14.

<sup>6</sup> *Id.* at ¶23.

<sup>7</sup> Order at p. 1 (emphasis added).

1 “Neutral facts” involve the “time, place, and content of an alleged misrepresentation.” *Id.* at  
 2 1547-48. These neutral facts “may identify the statement or the omission complained of, but these  
 3 circumstances do not ‘constitute’ fraud.” *Id.* As the Court held in its September 10 Order:

4 In addition to stating the time, place, and content of an alleged misrepresentation, a  
 5 plaintiff must “set forth what is false or misleading about a statement, and why it is  
 6 false.” *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-48 (9<sup>th</sup> Cir. 1994).<sup>8</sup>

7 Because a plaintiff “must set forth what is false or misleading about [the] statement,” *Fecht v.*  
 8 *Price Co.*, 70 F.3d 1078, 1082 (9<sup>th</sup> Cir. 1995) (quoting *GlenFed*, 42 F.3d at 1548), he must “set forth,  
 9 as part of the circumstances constituting fraud, an explanation as to why the disputed statement was  
 10 untrue or misleading when made.” *GlenFed*, 42 F.3d at 1549 (emphasis added).

11 The core of Hellmann’s RICO claims, even as amended, continue to rest on one basic  
 12 allegation: that the defendants submitted invoices charging Hellmann for services that were never  
 13 performed. Hellmann’s new allegations in support of its RICO claims still lack the requisite  
 14 specificity required under Rule 9(b). Hellmann amended its Complaint to describe certain invoices  
 15 (*see* paragraphs 9.1-9.20), emails (*see* paragraphs 10.1-10.10), and checks it cut to pay the foregoing  
 16 invoices (*see* paragraphs 11.1-11.12).<sup>9</sup> In other words, it amended its Complaint to include  
 17 allegations sufficient to identify the transactions it claims were fraudulent. But it failed to include  
 18 any additional allegations of specific facts explaining why these transactions were fraudulent.  
 19 Rather, it simply alleges that the invoices, emails, and checks, relate to services “that were never  
 20 performed.” For example, Hellmann alleges in paragraph 9.1 of its Amended Complaint:

21 On or about June 19, 2008, in or near Kent, Washington, the Enterprise mailed Pacnor  
 22 invoice No. 4590-11 to Hellmann’s Tukwila office, charging Hellmann \$8000 for  
 23 trucking, crating and offloading services, as stated in that invoice.<sup>10</sup> This invoice is  
 24 fraudulent because Pacnor never performed these services, because McNerny, Engel and  
 25 Pacnor knew Pacnor never performed these services at the time they mailed Hellmann

<sup>8</sup> *Id.* at p. 2.

<sup>9</sup> Hellmann further attached the invoices, emails and checks as exhibits to the Amended Complaint.

<sup>10</sup> Interestingly, nowhere on the referenced invoice does it state “trucking, crating, and offloading services” were performed.

1 this invoice, and because Harris, McNerny, Engel and Pacnor mailed this invoice to  
 2 Hellmann with the specific intent to defraud Hellmann of the amounts charged. A true  
 and correct copy of this invoice is attached hereto, marked as Exhibit 1<sup>11</sup>

3 Paragraphs 9.2 through 9.20 reference different invoices, but are substantially identical to  
 4 paragraph 9.1.<sup>12</sup> Although Hellmann's new allegations are indeed sufficient to identify the invoices it  
 5 claims were fraudulent, its conclusory allegations that the invoices were fraudulent simply because  
 6 the work reflected on the invoices "was never performed" are insufficient to satisfy the specificity  
 7 requirements of Rule 9(b). As the Ninth Circuit held in *Moore v. Kayport Package Express*, 885 F.2d  
 8 531 (9<sup>th</sup> Cir. 1989), "mere conclusory allegations of fraud are insufficient." *Id.* at 540. Hellmann  
 9 must "set forth what is false or misleading about a statement, and why it is false." *GlenFed*, 42 F.3d  
 10 at 1548 (emphasis added). In other words, Hellmann must "set forth, as part of the circumstances  
 11 constituting fraud, an explanation as to why the disputed statement was untrue or misleading when  
 12 made." *Id.* at 1549.

13 Although Hellmann may have set forth what is allegedly false about the invoices (*i.e.*, the  
 14 work reflected therein was never performed), it has failed to explain why this was false when the  
 15 invoices were submitted. The Ninth Circuit has indicated that the falsity requirement of Rule 9(b)  
 16 can be satisfied "by pointing to inconsistent contemporaneous statements or information (such as  
 17 internal reports) which were made by or available to defendants." *Id.* But Hellmann fails to point to  
 18 any such information. In fact, it points to no information whatsoever in support of its allegation. Its  
 19 conclusory allegations that the invoices reflect services the defendants "never performed" literally  
 20 stand alone, which is fatal to its RICO claims.

21 *Yourish v. California Amplifier*, 191 F.3d 983 (9<sup>th</sup> Cir. 1999), is instructive. That case  
 22 involved allegedly false statements made by corporate insiders to manipulate and inflate corporate  
 23 stock prices. The Court carefully analyzed whether the plaintiffs alleged specific facts explaining  
 24

25 <sup>11</sup> First Amended Complaint, ¶9.1.

<sup>12</sup> Paragraphs 10.1 – 10.10 and paragraphs 11.1 – 11.12 specifically reference certain emails and checks respectively, but are otherwise also substantively identical to paragraphs 9.1 – 9.20.

1 why the allegedly false statements were false when made, or if their allegations were merely  
 2 conclusory and insufficient to meet the requirements of Rule 9(b). The plaintiffs attempted to show  
 3 the falsity of the statements at issue by alleging the existence of confidential, non-public information  
 4 that was evidently available to the defendants. *Id.* at 994. However, the Court noted that the  
 5 plaintiffs provided no details about this alleged information, “other than the substance of the ‘true  
 6 facts’ revealed by the information.” *Id.* The Court concluded that this was fatal to the plaintiffs’  
 7 fraud claims. The Court explained:

8 By relying upon the existence of alleged “confidential non-public information,” without  
 9 any other details about the existence of the information, Plaintiffs merely identify certain  
 10 statements that they claim were misrepresentations, without providing particularized  
 11 facts about the circumstances constituting the fraud. If such unsupported general claims  
 12 were sufficient to satisfy Rule 9(b)’s particularity requirements, plaintiffs could  
 13 eliminate the falsity requirement entirely because they could merely identify a given  
 14 statement by the defendant and then simply allege that the substance of the statement  
 15 was contradicted by contemporaneous information contained in internal reports. Thus  
 16 any statement could be alleged to have been false at the time made. Such a standard  
 17 would clearly be inconsistent with our requirement that “circumstances indicating  
 18 falseness be set forth.”

19 *Id.* at 994-95 (quoting *GlenFed*, 42 F.3d at 1548).

20 Hellmann does not even rely on the existence of “confidential non-public information” in  
 21 support of its allegation that services reflected in the invoices at issue were never performed. It  
 22 simply claims that the work was never performed, without providing a single particularized fact  
 23 supporting this allegation. Hellmann likewise fails to allege a single fact supporting its claim that the  
 24 defendants knew the work was never performed when the invoices were submitted. Like the *Yourish*  
 25 plaintiffs, Hellmann merely identifies certain transactions (*i.e.*, invoices) and claims they were  
 fraudulent without alleging a single particularized fact about the circumstances constituting the  
 alleged fraud (*i.e.*, why the invoices at issue reflect work that was never performed). It is just this  
 type of unsupported general claim that, if held to satisfy Rule 9(b)’s particularity requirements, would  
 eviscerate the Ninth Circuit’s requirement that “circumstances indicating falseness be set forth.” *Id.*  
 at 995 (citing *GlenFed*, 42 F.3d at 1548). Quite literally, any invoice could be alleged to have been



1 fraudulent when issued. This result is clearly inconsistent with the particularity requirements of Rule  
2 9(b).

3 Important policy considerations also underlie the particularity requirements of Rule 9(b).  
4 Rule 9(b) prevents the filing of complaints as pretext for discovery of unknown wrongs and protects  
5 the reputations of potential defendants from the damage resulting from being accused of fraudulent  
6 acts. *Semegen v. Weidner*, 780 F.2d 727, 731 (9<sup>th</sup> Cir. 1986). The rule is further designed to  
7 “prohibit a plaintiff from unilaterally imposing upon the court, the parties and society enormous  
8 social and economic costs absent some factual basis.” *Id.*

9 Hellmann’s Amended Complaint, like the original Complaint before it, is devoid of any  
10 particular allegations regarding the circumstances of the alleged fraudulent transactions. It is nothing  
11 more than a fishing expedition, which Rule 9(b) is designed to prevent. These claims should be  
12 dismissed.

13 **B. The Amended Complaint Fails to Save Hellmann’s State Law Fraud Claims.**

14 Hellmann supports the state law fraud claims alleged in its Amended Complaint with the same  
15 allegations it offers in support of its RICO claims. For the reasons discussed above, these allegations  
16 fail to meet the particularity requirements of Rule 9(b). Hellmann’s state law fraud claims should be  
17 dismissed.

18 **C. If the Court Dismisses Hellmann’s RICO Claims It Should Decline to Exercise  
19 Supplemental Jurisdiction over Hellmann’s State Law Claims.**

20 The decision whether to continue to exercise supplemental jurisdiction over state law claims  
21 after all federal claims have been dismissed lies within the district court’s discretion. *Foster v.*  
22 *Wilson*, 504 F.3d 1046, 1051 (9<sup>th</sup> Cir. 2007); 28 U.S.C. § 1367(c)(3).

23 It has consistently been recognized that pendent jurisdiction is a doctrine of discretion,  
24 not of plaintiff’s right. Its justification lies in considerations of judicial economy,  
25 convenience and fairness to litigants; if these are not present a federal court should  
hesitate to exercise jurisdiction over state claims. . . . Certainly, if the federal claims are  
dismissed before trial, even though not insubstantial in a jurisdictional sense, the state  
claims should be dismissed as well.

1 *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed.2d 218 (1966) (footnote  
 2 omitted); *accord Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992); *Ernst*  
 3 *v. Roberts*, *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1089 (11<sup>th</sup> Cir. 2004); *Flowers v. Fiore*, 359  
 4 F.3d 24, 30 (1<sup>st</sup> Cir. 2004); *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 79 n.18 (2d Cir.  
 5 2003); *Brandenburg v. Hous. Auth. of Irvine*, 253 F.3d 891, 900 (6<sup>th</sup> Cir. 2001). Accordingly, the  
 6 Ninth Circuit does not hesitate to refrain from exercising supplemental jurisdiction over state law  
 7 claims when it dismisses federal RICO claims. *See, e.g., Ove v. Gwin* 264 F.3d 817, 826 (9<sup>th</sup> Cir.  
 8 2001).

9 In the interests of judicial economy and fairness to the parties, and to further the principles of  
 10 comity with state courts, the Court should refrain to exercise its supplemental jurisdiction over  
 11 Hellmann's remaining state law claims if it dismisses Hellmann's RICO claims.

#### 12 IV. CONCLUSION

13 For the reasons stated herein, the Court should dismiss Hellmann's RICO and state law fraud  
 14 claims against defendant Bruce Harris with prejudice and decline to exercise its supplemental  
 15 jurisdiction over Hellmann's remaining state law claims.

16 DATED this 2<sup>nd</sup> day of October, 2009.

17 CORNERSTONE LAW GROUP, PLLC

18  
 19 By /s/ Michael M.K. Hemphill  
 20 Michael M.K. Hemphill, WSBA #27340  
 21 Attorneys for Defendant Bruce Harris  
 22  
 23  
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Certificate of Service

I certify that on the date noticed below I electronically filed this document entitled  
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DATED this 2<sup>nd</sup> day of October, 2009, at Seattle, Washington.

/s/ Michael M.K. Hemphill  
Michael M.K. Hemphill